Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

In re
ZODIAC INVESTMENT, INC.,
Debtor.

CALIFORNIA POZZOLAN, INC.
and EDWARD SCHARF,
Petitioners,

vs.

ZODIAC INVESTMENT, INC.,
PATRICK C. CLARY and RONALD A. KASTANEK,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED

The question presented for review is whether the Ninth Circuit Court of Appeals committed error in its determination of what constituted the law of the case determined by the Bankruptcy Appellate Panel of the Ninth Circuit in a previous appeal, and in rendering a decision which is in conflict with its decision in a previous appeal from the Bankruptcy Appellate Panel in the same case.

PARTIES TO THE PROCEEDING

The parties [1] to the proceeding in the Ninth Circuit are those in the caption as well as Glen C. Nelson, Trustee for Zodiac Investment, Inc., Debtor.

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[1] Cal Pumice Inc. is a corporate name change from California Pozzolan, Inc. Petitioner has no parent companies or subsidiaries.

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No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

In re
ZODIAC INVESTMENT, INC.,
Debtor.

CALIFORNIA POZZOLAN, INC.
and EDWARD SCHARF,
Petitioners,

vs.

ZODIAC INVESTMENT, INC.,
PATRICK C. CLARY
and RONALD A. KASTANEK,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, California Pozzolan, Inc. (now Cal Pumice Inc.) and Edward Scharf, herein respectfully pray that a writ of certiorari issue to review a decision of the Ninth Circuit Court of Appeals, which is in conflict with an earlier decision on the same matter.

OPINIONS BELOW

The Order of the Ninth Circuit Court of Appeals, filed January 20, 1995, denying the petition for rehearing is reprinted herein as Appendix A.

The Memorandum Opinion of the Ninth Circuit Court of Appeals filed December 23, 1994, is reprinted herein as Appendix B.

The Judgment and the Memorandum Opinion of the Bankruptcy Appellate Panel of the Ninth Circuit filed November 22, 1993, is reprinted herein as Appendix C.

The Judgment and the Memorandum Opinion of the Ninth Circuit Court of Appeals filed March 31, 1992, is reprinted herein as Appendix D.

The Judgment and the Memorandum Opinion of the Bankruptcy Appellate Panel of the Ninth Circuit filed October 11, 1990, is reprinted herein as Appendix E.

GROUNDS OF JURISDICTION

1. The judgment to be reviewed is December 23, 1994.

2. The date of the order denying Appellees' motion for rehearing is January 20, 1995.

3. This Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals as set forth in 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Cal Pumice Inc., referred to in the opinions in the appendix, was the same corporation as California Pozzolan, Inc. by name change and was solely owned by Edward Scharf. The corporation purchased certain mining claims with its own funds, and expended in excess of 2 million dollars in developing the claims. (App. E-19).

A. The 1990 BAP Opinion (App. E)

On October 11, 1990, the Bankruptcy Appellate Panel of the Ninth Circuit ("BAP") reversed a judgment of the Bankruptcy Court for the District of Nevada. The Nevada court judgment consisted of the following judgments and orders.

1. Declaring that a joint venture existed between Zodiac Investment, Inc. ("Zodiac") and Edward Scharf ("Scharf") in respect to certain mining claims owned and developed by Scharf in which Zodiac had no monetary or operating interest.

2. Dissolving the joint venture, ordering Scharf to convey the claims to Zodiac, and excluding

Scharf from any further interest in the clai Scharf conveyed the claims to Zodiac in accordance with the order.

3. Awarding attorneys fees and costs to counsel for Zodiac to be paid by Scharf.

The reversal of the judgment was predicated upon a finding by the BAP that no joint venture was ever formed or existed.

B. The 1992 Ninth Circuit Opinion (App. D)

The BAP judgment was appealed to the Ninth Circuit Court of Appeals, which affirmed, adopting the reasoning and result of the BAP, on March 31, 1992.

Scharf then moved the Nevada court for orders restoring the claims to him, vacating the order for attorneys fees and costs, and for an accounting of profits from the operation of the claims during the period that they were owned by Zodiac. The motions were denied by the Nevada court on the ground that the BAP reversal was only a partial reversal, reversing only the existence of the joint venture.

C. The 1993 BAP Opinion (App. C)

Scharf appealed the judgment denying the motions and reordering attorneys fees to the BAP which again reversed the judgment of the Nevada court on November 22, 1993, holding that the judgment of the

Nevada court was entirely based upon the existence of a joint venture which was reversed in the 1990 BAP opinion, and therefore the claims must be returned to Scharf; the attorneys fees award vacated; and an accounting produced.

D. The 1994 Ninth Circuit Opinion (App. B)

The 1993 BAP judgment was appealed to the Ninth Circuit Court of Appeals, which reversed the BAP and reinstated the BAP 1990 judgment on the basis that the 1990 opinion was the law of the case. This judgment was filed December 23, 1994, and is the judgment which this Court is requested to review.

The basis for federal jurisdiction in the court of first instance is pursuant to 28 U.S.C. §158, and the determination that the judgment of the trial court was a final, appealable judgment.

REASONS FOR GRANTING THE WRIT

The Court in the decision under review reversed the decision of another federal appellate court (the BAP) on the ground that the second opinion of the BAP was an attempt to correct a misunderstanding of its first opinion (App. B-9), and that the first opinion of the BAP constituted the law of the case. It is submitted that this constituted an error in the analysis of the two BAP opinions which do not appear to be conflicting.

The decision of the 1994 circuit court relies upon the comment in the 1992 opinion of the circuit court to the effect that the 1990 BAP opinion did not address any of the bankruptcy court's orders requiring the parties to convey title to the mining claims (App. B-9). The reasoning ignores the fact that the BAP reversed the entire judgment of the trial court, and was not a partial reversal. The 1993 BAP opinion affirms this proposition in the following language "The decision rendered by this panel on October 10, 1990 was meant to be a general reversal of the order of the bankruptcy court." (App. C-9). The judgment under review concludes that the BAP judgment is reversed, and the orders of the bankruptcy court reinstated (App. B-10), thereby completely reversing the 1990 decision of the BAP, which reversed the entire judgment of the trial court, and which the Ninth Circuit Court of Appeals affirmed in the 1992 decision.

It therefore appears that the decision under review failed to recognize that the BAP judgments reversed the entire judgment of the trial court, and treats the BAP 1990 decision as a partial reversal limited to the existence of a joint venture only.

This case appears to be appropriate for review by this Court, both under the provisions of 28 U.S.C. Rule 17.1(a) and in accordance with the decision in *U.S. v. O'Malley*, 383 U.S. 627 (1966).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: March 28, 1995

Respectfully submitted,

LEWIS B. KEAN, JR.
Counsel of record

Attorney for Petitioners
CALIFORNIA POZZOLAN, INC.
and EDWARD SCHARF

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
JAN 20 1995
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re: ZODIAC INVESTMENT, INC.,
Debtor.

ZODIAC INVESTMENT, INC.; PATRICK C. CLARY; RONALD A. KASTANEK,
Appellants,

v.

CALIFORNIA POZZOLAN; EDWARD SCHARF,
Appellees.

No. 94-15297

D. C. No. NV-92-01652-RPV

ORDER

Before: GOODWIN, O'SCANNLAIN, KLEINFELD, Circuit Judges

Appellees' motion for extension of time to file petition for rehearing is GRANTED. The petition for rehearing received January 12, 1995, is deemed filed as of January 12, 1995.

A majority of the panel has voted to deny the petition for rehearing. The petition for rehearing is DENIED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 23 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re: ZODIAC INVESTMENT, INC.,
Debtor,

ZODIAC INVESTMENT, INC.;
PATRICK C. CLARY;
RONALD A. KASTANEK,
Appellants,

v.

CALIFORNIA POZZOLAN; EDWARD SCHARF,
Appellees.

No. 94-15297

D. C. No. NV-92-01652-RPV

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Russell, Perris and Volinn, Judges, Presiding

Submitted October 7, 1994
San Francisco, California **

Before: GOODWIN, O'SCANNLAIN, KLEINFELD, Circuit Judges.

This appeal considers whether the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") correctly interpreted and applied the directives of this Court laid out in a memorandum opinion from a prior appeal in this case. On remand from the first appeal, the bankruptcy court issued orders executing our judgment. The BAP overturned these orders on the grounds that our decision mandated a different result. While the BAP had jurisdiction to entertain the appeal, the BAP misapplied our decision. The BAP decision is therefore *reversed.*

I. BACKGROUND

This appeal marks the fourth time California Pozzolan, Inc. ("Cal Pumice") has come before this Court to challenge the bankruptcy court's ordered

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** The panel unanimously finds this case suitable for submission on the record and briefs and without oral argument. Fed. R. App. P. 34(a); Ninth Circuit Rule 34-4.

transfer of Cal. Pumice mining claims to Zodiac Investment, Inc. ("Zodiac").[1]

In 1988, the bankruptcy court found that a joint venture existed between Cal Pumice and Zodiac regarding the ownership of disputed mining claims and ordered Cal Pumice to make an accounting to the court. In an attempt to evade the jurisdiction of the bankruptcy court, Edward Scharf ("Scharf"), the principal director and stock holder of al Pumice, transferred title to himself and then leased the contested land to a third party. In response to Scharf's behavior, in 1989, the court levied sanctions against Cal Pumice and Scharf, requiring them to pay Zodiac's attorney fees and costs. (Zodiac's former counsel, Patrick C. Clary and Ronald A. Kastanek join this appeal to preserve the award of their fees.) In addition, the court ordered Scharf to deed the mining properties to Zodiac as trustee for the joint venture. Shortly thereafter, the court dissolved any joint venture relationship between Zodiac and Cal Pumice, leaving Zodiac the sole and absolute owner of the claims.

Cal Pumice appealed to the BAP. The BAP Memorandum decision, BAP No. NV-89-1438-RPV filed October 11, 1990 ("1990 BAP Opinion") reversed the Bankruptcy Court's finding of a joint venture, but did not address any other aspects of the Bankruptcy Court's final order.

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[1] Since the early dawn of this case, California Pozzolan, Inc. has changed its name to Cal-Pumice, [*sic*] Inc.

Cal Pumice moved to have the land deeded back and the bankruptcy court refused. Cal Pumice then petitioned this Court for a Writ of Mandamus to compel transfer of the property back to Cal Pumice. We denied that petition, as well as Cal Pumice's subsequent petition for rehearing. Cal Pumice then brought before this Court an emergency motion for an order to transfer the property and rents, and again was denied relief.

Zodiac appealed to this court and we affirmed the holding and reasoning of the 1990 BAP decision in our Memorandum decision in Case no. 90-16647 filed March 31, 1992. After we affirmed the BAP holding,the bankruptcy court fashioned supplemental orders to execute its decision in light of this Court's judgment. The bankruptcy court interpreted our decision as a partial reversal of its order, only overturning the finding of a joint venture. Accordingly, the bankruptcy court confirmed its award of sanctions and transfer of property to Zodiac. Cal Pumice once again appealed to the BAP. In its Memorandum Order filed November 22, 1993 ("1993 BAP Opinion"), the BAP reversed the bankruptcy court's supplemental orders. The BAP held that its original holding that no joint venture existed was intended to reverse all the bankruptcy court orders antecedent to that appeal. The BAP reasoned that the reversal of the finding of joint venture carried with it the reversal of the entire bankruptcy court order because the

order was premised on the existence of a joint venture.[2] Zodiac, Clary and Kastanek appeal this 1993 BAP decision to this Court.

II. JURISDICTION

The BAP and this Court may review only final decisions, pursuant to Rule 8001(a) of the Rules of Bankruptcy Procedure and 28 U.S.C. §1291 respectively. A final decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 232-33 (1945); *In re Allen*, 896 F.2d 416, 418-19 (9th Cir. 1990). Although orders that merely execute a final judgment may not be appealed to challenge that final judgment, the bankruptcy court orders in the present case are appealable. Because our 1992 decision did not consider the issue of sanctions or the transfer of property, (*see* discussion below), the bankruptcy court orders relating to those issues cannot be considered mere supplemental orders executing our judgment. The

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[2] Specifically, the bankruptcy court entered the following orders on remand which the BAP reversed: 1) on June 10, 1992, the court determined that the BAP and the Ninth Circuit memoranda were partial reversals, reversing only the joint venture conclusion; 2) on July 8, 1992, the court ordered payment of sanctions and attorney's fees to attorneys Clary and Kastanek in accordance with previous orders; 3) on July 31, 1992, the court ordered payment of accounting fees, costs and sanctions based upon the bankruptcy court order of May 2, 1989; and 4) on October 30, 1992, the court denied Scharf's motion for vacating the judgments for payment of attorneys' fees and sanctions, for restitution of the disputed mining claims, and for accounting of funds received by Zodiac from operation of the claims.

most recent bankruptcy court orders confirming sanctions and refusing to transfer the claims back to Cal Pumice, while not new, are the final word of the bankruptcy court on issues that impact substantive rights of the parties. *Id*. Thus, the bankruptcy court orders are final, were appealable to the BAP, and the final BAP judgment is properly appealed to this Court.

III. THE LAW OF THE CASE

Our 1992 decision is the law of the case. As such, it must be followed in all subsequent proceedings, unless evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to certain issues, or the decision was clearly erroneous and would work a manifest injustice. *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400 (9th Cir. 1993); *Planned Parenthood of Cent. and Northern Arizona v. State of Ariz.*, 718 F.2d 938 (9th Cir. 1983). Because none of these exceptions are asserted or applicable here, the bankruptcy court, the BAP, as well as this Court on review is bound to follow the directives of our 1992 opinion affirming the BAP's reversal of the bankruptcy court's finding that a joint venture existed.

Appellants mistakenly argue that our prior holding is res judicata, barring further action on the sanctions and transfer orders before the BAP. The doctrine of res judicata does not apply here. Res judicata bars a second action on the same cause of action and between the same parties. The law of the case doctrine applies, in cases like the one at hand, where no second action is

being brought, but where there has been a reversal and remand for further proceedings in the same litigation. *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 136 (1921); *Hansen & Rowland v. C.F. Lytle Co.*, 167 F.2d 998, 998-999 (9th Cir. 1948).[3]

Unlike res judicata, which not only bars all claims that were decided, but all claims that could have been brought in the prior action, "a judgment of reversal by an appellate court is an adjudication only of matters expressly discussed and decided, which become the law of the case in further proceedings on remand and appeal." *Id.*; *New York Life Ins. Co. v. Gamer*, 106 F.2d 375 (9th Cir. 1939). Here, the 1990 BAP reversal and our affirmance of it adjudicated, and therefore is conclusive, only on the issue of joint venture.

Although a bankruptcy court order awarding sanctions and transfer of the claims was also before the BAP in 1990, the only issue the BAP decided in its 1990 Memorandum Opinion was "[w]hether the bankruptcy court erred in finding that Zodiac and Cal Pumice were engaged in a joint venture." (1990 BAP Opinion at 7). The 1990 BAP Opinion limits its discussion and ruling to the joint venture issue. Our 1992 opinion affirming the

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[3] It should be noted that this Court's ruling on Scharf's and Cal Pumice's petition for writ of mandamus, motion for reconsideration of our order denying mandamus, and emergency motion to transfer the mining claims do not preclude this Court from later determining that the sanctions and/or the transfer of claims was improper, particularly considering that the emergency motion was denied on procedural grounds. *See, Kirkbride v. Continental Cas. Co.*, 933 F.2d 729, 732 (9th Cir. 1991).

BAP reversal did not broaden the scope of the adjudication. Rather, "we adopt[ed] the BAP's reasoning and results." (1992 Ninth Circuit Opinion at 4).

Moreover, we specifically held that the "BAP's memorandum opinion and judgment do not address any of the bankruptcy court's orders requiring the parties to convey title to mining claims." *Id*. at 2; *Cf. DePinto v. Landoe* , 411 F.2d 297 (9th Cir. 1969) (where Court of Appeals expressly reserves an issue in its ruling, its judgment does not establish that issue as law of the case or give it res judicata finality). The law of the case, our 1992 decision, precludes the bankruptcy court, the BAP and even this Court, barring exceptional circumstances, from reading the adjudication of the prior appeal as anything more than a reversal of the finding of a joint venture.

III. [*sic*] THE IMPACT OF OUR HOLDING

The question then remains concerning what our 1992 decision required the bankruptcy courts [*sic*] to do. The BAP misapplied our holding in the BAP's most recent decision concluding that reversal of a finding of joint venture necessitates reversal of the orders awarding sanctions and transfer of the mining claims to Zodiac. The BAP's conclusion exceeded the directives of our judgment.

The bankruptcy court's order of sanctions stands completely independent of the existence of a joint venture. The bankruptcy court imposed sanctions against Scharf and Cal Pumice because they were found

in contempt of court. Even if the underlying orders which Cal Pumice and Scharf disobeyed and evaded were later reversed, completely vindicating their legal position, which they were not, later vindication would not change the fact that they violated court orders which they were obliged to honor. Resolution on the merits of a case does not expunge sanctionable violations. *Pan-Pacific Low Ball Television, Co. v. Pacific Union*, 987 F.2d 594, 596 (9th Cir. 1993). If Scharf and Cal Pumice desired absolution, they should have timely challenged the finding of contempt. Later reversal by BAP of the orders they disobeyed and evaded could not retroactively purify their unclean hands, even if the BAP had been correct in reversing those orders.

There is some logic to the BAP's conclusion that the transfer of the mining claims was predicated on the finding of a joint venture and therefore should be reversed along with the finding of a joint venture. However, this Court could not have made its finding more plain: "The BAP's memorandum opinion and judgment do not address any of the bankruptcy court's orders requiring the parties to convey title to mining claims." (1992 Ninth Circuit Opinion at 2). The BAP is wholly without authority to "correct" what it apparently perceived as our misunderstanding of its prior decisions.

We said that "the bankruptcy court fashioned a joint venture between Zodiac and Cal Pumice as an equitable remedy." *Id*. The bankruptcy court has made clear in prior and subsequent orders that equitable concerns motivated the original transfer of the claims, as well as that court's persistent refusal to transfer the claims back to Scharf or Cal Pumice. Even though implying a joint

venture was an inappropriate remedy, it does not mean that the underlying equities have been changed or that transfer based on other equitable grounds is necessarily inappropriate. The bankruptcy court orders were fully supported by the facts and the law.

IV. CONCLUSION

The BAP judgment is *reversed* and the orders of the bankruptcy court reinstated.

FILED
DEC 23 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

Judge Kleinfeld, Circuit Judge, dissenting:

I respectfully dissent.

The record does not establish that Scharf engaged in a fraudulent transaction. We said so in dictum in our previous affirmance of the BAP decision, but that does not establish a fact. The bankruptcy judge so found, but his decision was reversed. For all we know, Scharf bought the mining claims from Zodiac in exchange for forgiveness of a debt, then had to buy them again from Osuna because Zodiac did not own them, and then was ordered by the Bankruptcy Court to give back to Zodiac what he had had to buy from Osuna after Zodiac had sold him what it did not own. We do not know. We cannot find facts on appeal.

Our holding did nothing more than affirm the previous decision of the Bankruptcy Appeals Panel. We expressly adopted its reasoning and result.

The Bankruptcy Appeals Panel decided, and we affirmed, that Scharf and Zodiac did not engage in a joint venture. The only issue on appeal before the Bankruptcy Appeals Panel was "[w]hether the bankruptcy court erred in finding that Zodiac and Cal Pumice were engaged in a joint venture." The erroneous joint venture determination was the only basis for the Bankruptcy Court order requiring Scharf to convey his property to

Zodiac and provide an accounting.

The Bankruptcy Appeals Panel, after our affirmance, ruled that the orders for sanctions and an accounting fell along with the joint venture decision. That ruling was a permissible one, *Thomassen v. United States*, 835 F.2d 727, 732 (9th Cir. 1987), and did not violate our mandate. Our mandate did not do anything but affirm, nor did any holding in our decision.

I would affirm the Bankruptcy Appeals Panel decision in its entirety.

APPENDIX C.

UNITED STATES BANKRUPTCY
APPELLATE PANEL
OF THE NINTH CIRCUIT

FILED
NOV 22 1993
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

In re
ZODIAC INVESTMENT, INC., a Utah corporation, dba Young American Mobile Home Sales,
Debtor.

CALIFORNIA POZZOLAN, INC., aka Cal Pumice, Inc.; EDWARD SCHARF,
Appellants,

v.

GLEN R. NELSON, Trustee for Zodiac Investment, Inc.; CALIFORNIA LIGHTWEIGHT PUMICE, INC.,
Appellees.

CALIFORNIA POZZOLAN, INC., aka Cal Pumice, Inc.; EDWARD SCHARF,
Appellants,

v.

GLEN R. NELSON, Trustee for Zodiac Investment, Inc.,
Appellee.

CALIFORNIA POZZOLAN, INC., aka Cal Pumice, Inc.; EDWARD SCHARF,

Appellants,

v.

ROSS PROCK; GLEN R. NELSON, Trustee for Zodiac Investment, Inc.,

Appellees.

CALIFORNIA POZZOLAN, INC., aka Cal Pumice, Inc.; EDWARD SCHARF,

Appellants,

v.

GLEN R. NELSON, Trustee for Zodiac Investment, Inc.,

Appellee.

BAP No. NV-92-1652-RPV
NV-92-1753-RPV
NV-92-1840-RPV
NV-92-2195-RPV
(consolidated)

Bk. No. BK-S-820657-RCJ
Adv. No. 820947

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for the District of NEVADA.

THIS CAUSE came on to be heard on the record and the briefs of the parties.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is REVERSED AND REMANDED.

FOR THE PANEL,

Nancy B. Dickerson
Panel Clerk

/s/ Cynthia E. Ashton

By: Cynthia E. Ashton
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY
APPELLATE PANEL
OF THE NINTH CIRCUIT

FILED
NOV 22 1993
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

In re
ZODIAC INVESTMENT, INC., A Utah Corporation, dba Young American Mobile Home Sales,
Debtor.

CALIFORNIA POZZOLAN, INC., also known as Cal Pumice, Inc.; EDWARD SCHARF,
Appellants,

v.

GLEN R. NELSON, Trustee for Zodiac Investment, Inc.; CALIFORNIA LIGHTWEIGHT PUMICE, INC.,
Appellees.

CALIFORNIA POZZOLAN, INC., also known as Cal Pumice, Inc.; EDWARD SCHARF,
Appellants,

v.

GLEN R. NELSON, Trustee for Zodiac Investment, Inc.,
Appellee.

CALIFORNIA POZZOLAN, INC., also known as Cal Pumice, Inc.; EDWARD SCHARF,
Appellants,

v.

ROSS PROCK; GLEN R. NELSON, Trustee for Zodiac Investment, Inc.,
Appellees.

CALIFORNIA POZZOLAN, INC., also known as Cal Pumice, Inc.; EDWARD SCHARF,
Appellants,

v.

GLEN R. NELSON, Trustee for Zodiac Investment, Inc.,
Appellee.

BAP No. NV-92-1652-RPV
NV-92-1753-RPV
NV-92-1840-RPV
NV-92-2195-RPV
(consolidated)

BK. No. BK-S-820657-RCJ

MEMORANDUM

Submitted Without Oral Argument [1]
on September 1, 1993

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[1] The panel unanimously finds this case suitable for decision without oral argument pursuant to Fed. R. Bankr. P. 8012 and BAP Rule 3.

-C 6-

Filed - NOV 22 1993

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Robert Clive Jones,
Bankruptcy Judge, Presiding

Before: RUSSELL, PERRIS, and VOLINN,
Bankruptcy Judges.

This appeal arises from four orders of the bankruptcy court entered on June 10, 1992, July 8, 1992, July 31, 1992 and October 30, 1992, consolidated for purposes of this appeal.

I. FACTS

Appellant, California Pozzolan, ("Cal Pumice),[2] and Debtor/Appellee, Zodiac Investment, Inc., ("Zodiac"), entered into a loan agreement on April 6, 1981. Subsequently, Zodiac defaulted and an agreement was reached between the parties, in lieu of foreclosure, granting Cal Pumice certain pozzolan and pumice mining claims. Five months later, Zodiac filed a Chapter 11 petition.

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[2] Since the name of California Pozzolan, Inc. was subsequently changed to Cal Pumice, Inc., all references will be to the current name of the corporation, Cal Pumice, Inc (Cal Pumice).

Zodiac filed a complaint seeking to have the mining claims reconveyed. Irrespective of the action between Cal Pumice and Zodiac, the pumice claims were determined to be the property of Bonnie L. Osuna ("Osuna"). Cal Pumice consequently purchased the pumice claims from Osuna and received the deeds on June 24, 1983. Cal Pumice, pursuant to the bankruptcy court's order for entry of partial judgment, reconveyed the pozzolan mining claims back to Zodiac.

Subsequently, Cal Pumice and Edward Scharf ("Scharf"), sole owner of Cal Pumice, filed a cross-complaint against Zodiac. On August 17, 1988, an order was entered by the bankruptcy court determining that a joint venture was formed on January 5, 1982 between Cal Pumice, Scharf and Zodiac.

After the August 17, 1988 judgment, the bankruptcy court rendered the following orders, all predicated upon the existence of the joint venture: 1) On March 3, 1989, the bankruptcy court changed the effective date of the creation of the joint venture from January 5, 1982 to December 11, 1986; 2) On May 2, 1989, the court ordered sanctions and attorney fees because of a transfer of the Osuna pumice claims from Cal Pumice to Scharf and because of a mineral lease executed between Scharf and Kenneth Teel. Scharf was also ordered to transfer the Osuna claims to Zodiac, as trustee for the joint venture.

Cal Pumice and Scharf appealed the orders and on October 10, 1990 this Panel reversed the bankruptcy court's finding that a joint venture existed between Cal Pumice, Scharf and Zodiac. Zodiac appealed the BAP

decision to the Ninth Circuit Court of Appeals, which affirmed the BAP memorandum.

After the Ninth Circuit affirmed the BAP, the case was remanded to the trial court for further proceedings in accordance with the rulings of the BAP and the Ninth Circuit. In response to the remand, the bankruptcy court entered the following four orders: 1) on June 10, 1992, the court determined that the BAP and the Ninth Circuit memoranda were partial reversals, reversing only the joint venture conclusion; 2) on July 8, 1992, the court ordered payment of sanctions and attorneys' fees to attorneys Clary and Kastanek in accordance with previous orders; 3) on July 31, 1992, the court ordered payment of accounting fees, costs and sanctions based upon the bankruptcy court order of May 2, 1989; 4) on October 30, 1992, the court denied Scharf's motion for vacating the judgments for payment of attorneys' fees and sanctions; for restitution of the Osuna claims; and for accounting of funds received by Zodiac from operation of the Osuna claims.

Timely notices of appeal were filed by Scharf and Cal Pumice from all four entered orders.

II. DISCUSSION

1. The Orders of the Bankruptcy Court were Final Orders.

The Ninth Circuit has held that in a bankruptcy context a final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *In re Allen*, 896 F.2d 416, 418

(9th Cir. 1990); *In re Landmark Hotel & Casino, Inc.*, 872 F.2d 857, 860 (9th Cir. 1989). The Ninth Circuit takes the pragmatic approach to finality and uses a test that "emphasizes the need for immediate review, rather than whether the order is technically interlocutory. . . ." *In re Rega Properties, Inc.*, 894 F.2d 1136, 1138 (9th Cir. 1990); see also, *In re Mason*, 709 F.2d 1313, 1315-18 (9th Cir. 1983).

The attorney and accountant fees, and sanctions have been fully determined and as such are final orders. As to the orders refusing to vacate the judgment, we also hold that these are final orders. Since the orders are final, they are appealable and can be reviewed by the BAP.

2. The Judgments of the Bankruptcy Court Must be Reversed.

The decision rendered by this panel on October 10, 1990 was meant to be a general reversal of the order of the bankruptcy court. Unfortunately, we did not explicitly state the necessary consequences of reversal of the trial court's fundamental premise that there was a joint venture. This premise was the only basis for Zodiac having an interest in the subject property thereby warranting the trial court's order dealing with or implementing transfer of such interest. Therefore, when we reversed the finding of a joint venture, the bankruptcy court's entire order was to be reversed. Since the Osuna claims have been held by Zodiac, as Trustee on the basis of a reverse ruling as to the joint venture, the claims must now be retransferred to Scharf. Also, an accounting to Scharf for the net proceeds

derived from the transferred Osuna claims during the period that Zodiac had possession of the Osuna claims must be determined.

III. CONCLUSION

The bankruptcy court's four entered orders of June 10, 1992, July 8, 1992, July 31, 1992 and October 30, 1992, are REVERSED in their entirety and REMANDED for an appropriate accounting to Scharf of the net proceeds derived from the transferred Osuna claims during the period that debtors had possession of the claims.

APPENDIX D

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: ZODIAC INVESTMENT, INC.
Debtor

GLEN NELSON, Trustee, for Zodiac Investment, Inc.
Appellant

v.

CALIFORNIA POZZOLAN; EDWARD SCHARF
Appellees

NO. 90-16647
CT/AG#: NV-89-1438-RPV

APPEAL FROM the United States Bankruptcy Appellate Panels District of Nevada (Las Vegas).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States Bankruptcy Appellate Panels for the District of Nevada (Las Vegas) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the _____ judgment of the said Bankruptcy Appellate Panel in this cause be, and hereby is affirmed.

Filed and entered March 31, 1992

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
MAR 31 1992
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

In re: ZODIAC INVESTMENT, INC.,
Debtor.

GLEN NELSON, Trustee for Zodiac Investment, Inc.,
Appellant,

v.

CALIFORNIA POZZOLAN; EDWARD SCHARF,
Appellees.

No. 90-16647

BAP No. NV-89-1438-RPV

MEMORANDUM*

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

On Appeal from the Bankruptcy Appellate Panel
for the Ninth Circuit Court of Appeals
Barry Russell, Bankruptcy Judge, Presiding
Sidney C. Volinn, Chief Bankruptcy Judge
Elizabeth L. Perris, Bankruptcy Judge

Argued and Submitted December 12, 1991
San Francisco, California

Before: NORRIS, BEEZER and LEAVY,
Circuit Judges

This case considers whether a transfer of mining claims in anticipation of a merger agreement produces a joint venture if the parties never conclude their merger agreement and the transferee works the claims. The Bankruptcy Appellate Panel (BAP) reversed the bankruptcy court's judgment, which was predicated on the existence of a joint venture. Glen Nelson, trustee for Zodiac Investment, Inc. (Zodiac), appeals the BAP's reversal.

I

This case has seen years of litigation and numerous bankruptcy court orders attempting to allocate the ownership of the pozzolan and pumice claims at issue. Without getting bogged down in detail, it suffices to say that both Zodiac and Cal Pumice, successor to California Pozzolan, come before us with less than clean hands. The transfer undergirding this case had as its objective the defrauding of Zodiac's creditors.

Zodiac transferred pozzolan claims. Cal Pumice mined pumice. Bonnie Osuna temporarily halted Cal Pumice from mining pumice. Cal Pumice resumed mining pumice after purchasing Osuna's claims. Predicated roughly upon these facts, the bankruptcy court fashioned a joint venture between Zodiac and Cal Pumice as an equitable remedy.

The BAP looked to the legal requirements for creating a mining partnership in California to determine that no joint venture existed. It reversed the bankruptcy court's judgment allocating joint venture profits since December 11, 1986. The BAP's memorandum opinion and judgment do not address any of the bankruptcy court's orders requiring the parties to convey title to mining claims.

II

"[A] federal court must determine sua sponte its proper jurisdiction." *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1377 (9th Cir. 1985). We have jurisdiction over a bankruptcy appeal when the decisions of both the bankruptcy court and the BAP are final. 28 U.S.C. § 158(d); *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 911 (9th Cir. 1988); *King v. Stanton (In re Stanton)*, 766 F.2d 1283, 1285 (9th Cir. 1985). A BAP renders a final order when it affirms or reverses a bankruptcy court's final order. If the BAP remands for factual determinations on a central issue, its order is not final and this court lacks jurisdiction to review it. *Kelly*, 841 F.2d at 911; *Stanton*, 766 F.2d at 1287. Because the BAP reversed the bankruptcy court's final judgment and identified no factual issues requiring

determination on remand, we have jurisdiction.

III

Zodiac claims that the BAP should not have reversed the bankruptcy court's imposition of a joint venture because it did not have the full record before it. Thus, the BAP could not tell that the bankruptcy court had clearly erred. Zodiac discounts the importance of oral argument by making such a claim.

Before the BAP, Zodiac conceded that "the only evidence supporting the existence of the joint venture is the agreements of November 24, 1981, and January 25, [sic] 1982." *California Pozzolan, Inc. v. Zodiac Investment (In re Zodiac Investment)*, No. NV-89-1438-RPV, memorandum op. at 17 (Bankr. 9th Cir. Oct. 11, 1990) (Perris, Bankr. J., concurring) (ER 32); *see also id.* at 11 (majority opinion) (ER 26). Zodiac now purports to have unearthed extensive additional evidence not considered by the BAP. We refuse to consider evidence not considered by the BAP because of an express representation at oral argument.

Reviewing the BAP's decision in light of the record it considered, we adopt the BAP's reasoning and result. *See id.* at 8-14 (ER 23-29).

IV

The BAP's judgment is AFFIRMED.

APPENDIX E

UNITED STATES BANKRUPTCY
APPELLATE PANEL
OF THE NINTH CIRCUIT

FILED
OCT 11 1990
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

In re
ZODIAC INVESTMENT, INC.,
Debtor(s).

CALIFORNIA POZZOLAN, INC., a Nevada Corporation, and EDWARD SCHARF,
Appellant(s),

v.

ZODIAC INVESTMENT, INC.
Appellee(s).

BAP No. NV-89-1438-RPV
NV-89-1831-RPV

Bankruptcy No. BK-S 82-00657-RCJ
Adversary No. ADV-S 820047 [*sic*]

JUDGMENT

ON APPEAL from the United States Bankruptcy Court for the District of NEVADA.

THIS CAUSE came to be heard on the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Panel that the judgment of the Bankruptcy Court is REVERSED.

FOR THE PANEL,

Nancy B. Dickerson
Panel Clerk

/s/ Cynthia E. Ashton

By: Cynthia E. Ashton
Deputy Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY
APPELLATE PANEL
OF THE NINTH CIRCUIT

FILED
OCT 11 1990
NANCY B. DICKERSON, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

In re
ZODIAC INVESTMENT, INC.
Debtor.

CALIFORNIA POZZOLAN, INC. a Nevada Corporation and EDWARD SCHARF,
Appellants.

vs.

ZODIAC INVESTMENT, INC.
Appellee.

BAP No. NV-89-1438-RPV
(Consolidated with NV-89-1831)

BK. No. 82-00657-RCJ
ADV. No. 820947

MEMORANDUM

Argued and Submitted on
January 18, 1990 at Phoenix, Arizona

Filed on
Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Robert Clive Jones,
Bankruptcy Judge, Presiding

Before: RUSSELL, PERRIS, and VOLINN,
Bankruptcy Judges

I.

FACTS

Appellee/debtor Zodiac Investment, Inc. (Zodiac), and appellant California Pozzolan, Inc. (Pozzolan) entered into a loan agreement on April 6, 1981 whereby appellant Edward Scharf (Scharf), sole owner of California Pozzolan, loaned Zodiac $50,000 secured by certain mining equipment. Pozzolan subsequently changed its name to Cal Pumice, Inc. (Cal Pumice). [1]

Zodiac defaulted on the loan. Scharf and Zodiac entered into a tentative agreement dated November 24, 1981, entitled "Outline of Understanding to be Finalized" in lieu of foreclosure on the security. The tentative agreement was formalized in a final agreement on January 5, 1982 entitled "Agreement of Compromise and

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[1] Since the name of California Pozzolan, Inc. was changed to Cal Pumice, Inc., for convenience all references will be to the current name of the corporation, Cal Pumice, Inc. (Cal Pumice).

Settlement", granting Cal Pumice certain pozzolan and pumice claims and millsites, and transferring the mining equipment securing the loan.[2] The agreement anticipated merger negotiations at some time in the future after the resolution of litigation in which Zodiac was a defendant (Hoover case).

Zodiac filed a Chapter 11 petition on May 26, 1982. Scharf commenced mining operations on the pumice claims on July 28, 1982. Cal Pumice was served a restraining order on July 30, 1982 and named as a defendant in a law suit brought by one Bonnie L. Osuna to determine the true owner of the pumice claims, *Bonnie L. Osuna v. David E. Hoover, California Pozzolan, Inc., Zodiac Investment Inc., et. al.*, in Superior Court of Inyo County, California. While the Osuna litigation was pending, on December 22, 1982 Zodiac filed an adversary complaint seeking the reconveyance of the mining claims and an accounting of any mining profits. Osuna was determined to be the true owner of the pumice claims that Zodiac had deeded to Cal Pumice. Cal Pumice then purchased the pumice claims from Osuna and received the deeds on June 24, 1983.

On May 23, 1983 Cal Pumice reconveyed the pozzolan mining claims to Zodiac pursuant to the bankruptcy court's order for entry of partial judgment.

---

[2] The pumice claims transferred by Zodiac to Cal Pumice are referred to in the briefs and excerpts of record as the "Margie" claims. After the *Osuna* litigation, they were also referred to as the "Osuna" claims. Margie 33-42 and Osuna 33-42 [*sic*] refer to the same claims which are the subject of this appeal.

On November 21, 1983 Cal Pumice and Scharf filed a cross-complaint against Zodiac alleging that Zodiac knew or should have known that Zodiac in fact did not own the mining claims and made such representations for the purpose of deceiving, misleading and defrauding Cal Pumice. On August 17, 1988 the bankruptcy court rendered judgment against Cal Pumice on it's cross-complaint.

On October 30, 1986 at the trial of the adversary proceeding, the bankruptcy court made an oral finding regarding a joint venture between Zodiac and Cal Pumice:

> But nevertheless, I'm forced to conclude that this was a joint venture in full intention between the parties, and anything conducted in that regard, including the payment to Mr. -- on the Osuna claims, was for the benefit of that co-venture. *And I think that is the fairest result and remedy.*

(Emphasis added).

However, the court went on to state that Scharf had the right to mine the claims and that the co-venture did *not* benefit from Scharf's activities until such time in the future as there was a merger following completion of Zodiac's pending Hoover litigation:

> Nevertheless, I want Mr. Scharf to account for the entire period. That may well help me decide what, whether it's 50 cents per

> ton or 50 cents per yard. But I will state as a finding now that he has no obligation to pay over any profits he had during that reasonable period of time.

It is not clear from the transcript of the October 30, 1986 trial that the bankruptcy court was making a finding that a joint venture currently existed between Zodiac and Cal Pumice, or that the intent of the parties was that a joint venture would come into existence at the successful conclusion of the Hoover litigation and successful merger negotiations. If there were a current joint venture, then the profits would benefit the joint venture even before the Hoover litigation had concluded and not, as the court found, only to Scharf.

At the May 5, 1987 hearing, viewing the full transcript of the October 30 trial, the court stated:

> I think I suggested in these findings that he's not obligated for any profits for a reasonable period that it would take to resolve the Hoover litigation. But beyond that point, the efforts were for the purpose -- for the benefit of the joint venture.
>
> But nevertheless, I asked him to prepare an accounting for the whole period of time so we could make some assessment of what the reasonable period was. He was entitled to credits for all the monies he had invested, and possibly interest on that.

Subsequent to the bankruptcy court's oral ruling, on December 10, 1986, the Osuna pumice claims were transferred from Cal Pumice to Scharf individually. On March 1, 1987, Scharf executed a mineral lease of the pumice claims to Kenneth Teel and sold the equipment he had received in satisfaction of Zodiac's default.

Scharf supplied an accounting pursuant to the court's order on December 9, 1986 with a supplement on December 17, 1986. Zodiac objected to the sufficiency of the accounting. Zodiac's motion to compel disclosure of sales was heard May 5, 1987 and judgment in favor of Zodiac was entered August 17, 1988. That judgment ordered:

1. that Scharf provide a detailed financial accounting for the period from January 5, 1982 up to the date of the accounting;

2. that credits due Scharf would be calculated from the accounting;

3. that a joint venture commenced on January 5, 1982, the date of the "Agreement of Compromise and Settlement";

4. that the joint venture would be divided equally;

5. that the joint adventurers shall preserve and protect the assets of the joint venture.

Scharf submitted an accounting prepared by a certified public accounting firm. Zodiac objected to the sufficiency of the backup documentation and pursuant to

a hearing on February 8, 1989 the court entered an order on March 6, 1989, entitled "Order Awarding Sanctions for Incompleteness of Accounting, Granting Motion for Sanctions, and Amending and Clarifying and/or Amending Amended Judgment *Nunc Pro Tunc*".

This second order provided that:

1. the date of the commencement of the joint venture was not January 5, 1982 but December 11, 1986, the day after Scharf transferred the pumice claims to himself;

2. the transfer of the pumice claims from Cal Pumice to Scharf and the mineral lease to Kenneth Teel were in violation of the court's October 30, 1986 oral finding of a joint venture and were nullified;

3. Scharf was ordered to transfer the Osuna claims to Zodiac, as trustee for the joint venture;

Scharf transferred the Osuna claims to Zodiac pursuant to the court's order. Another hearing on the accounting was held on March 13, 1989 and the court entered an order on May 2, 1989, "Order Awarding Sanctions and Clarifying and/or Supplementing Judgment *Nunc Pro Tunc* and Amended and Supplemental Judgment *Nunc Pro Tunc*." The third order provided that:

1. the transfer of the Osuna claims from Cal Pumice to Scharf and the mineral lease to Kenneth Teel were in contempt of the court's oral ruling of October 30, 1986 and were done in bad faith attempts to secret [*sic*] and remove the Osuna claims from the jurisdiction of the

court;

2. Zodiac was granted sanctions and attorney's fees against Scharf;

3. the joint venture is dissolved;

4. title to the pumice claims vests solely in Zodiac from March 13, 1989;

Scharf and Cal Pumice filed a motion for reconsideration of the March 10, 1989 judgment that was denied by an order entered May 2, 1989.

A stipulated judgment and final accounting between the parties was entered on August 23, 1989. The judgment provided that Cal Pumice and Scharf owe Zodiac $68,637.18 plus interest after June 6, 1989 for its one-half share of the joint venture commencing December 11, 1986; that no further accounting shall be required as to the joint venture and that the judgment shall be *res judicata* upon the parties.

The appellants timely filed two notices of appeal. The cases have been consolidated.

II.

ISSUE

Whether the bankruptcy court erred in finding that Zodiac and Cal Pumice were engaged in a joint venture.

III.

STANDARD OF REVIEW

Findings of fact are reviewed under a clearly erroneous standard. *In re Wavelength, Inc.*, 61 Bankr. 614, 619 (9th Cir. BAP 1986); Bankr. R. 8013. Conclusions of law are reviewed *de novo*. *Ragsdale v. Haller*, 780 F.2d 794, 794 [*sic*] (9th Cir. 1986). Whether a joint venture exists is a finding of fact and is reviewed under the clearly erroneous standard. *See Spier v. Lang*, 4 Cal. 2d 711 (1935).

IV.

DISCUSSION [3]

A. Jurisdiction

During oral argument the appellee argued that this Panel may not review the issue of whether a joint venture *existed* because a final order had been entered on August 17, 1988 declaring that a joint venture had existed and that the subsequent March 6, 1989 order merely modified that date of commencement. This Panel has jurisdiction to hear this appeal pursuant to 28

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[3] The "Agreement of Compromise and Settlement" provides that "[t]his Agreement shall be governed by the laws of the state of California." Excerpts at 63.

U.S.C. § 158.[4] The May 2, 1989 judgment (amending the March 6, 1989 judgment which amended the August 17, 1988 judgment) is a final, appealable judgment.

B. Was there a joint venture?

As an equitable remedy, the bankruptcy court initially found that there was a joint venture between Zodiac and Cal Pumice commencing January 5, 1982 as to the Osuna claims:

> THE COURT: He lent $50,000. That loan was in default. That was resolved by the transfer of certain properties.
>
> . . .
>
> Well, since that time, he's spent very substantial monies. The potential remedies are, number one, to grant some kind of recision. Mr. Clary even admits that that lacks in some practicality. The second is to grant some judgment. I agree totally with Mr. Kean that damages here are speculative, at best.
>
> As to the basis for the final alternative, I do look to Mr. Clary's brief. It discusses a principle, I'm fairly new to mining law,

---

[4] 28 U.S.C. § 158(d) provides:
The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

but he discusses a principle in his initial brief, citing several mining cases.

. . .

He states, and so far, at least in the briefs, it's been uncontroverted that an "Agent, trustee, co-tenant or other person holding confidential relations with an original locator or owner of a mining claim who attempts in violation of a contract during breach of the trust to relocate or fraudulently obtains title to the claim in his own name will be charged in equity as a trustee of the rightful owner, and he will not be permitted to secure any advantage by such attempted relocation or title obtained." Citing rather a, rather several fairly old federal cases, a 1988 Nevada case, an 1897 Alaska case, Colorado, Idaho, Utah case. An [*sic*] that, I have not had the opportunity the [*sic*] review those cases, and I think I better. I can certainly anticipate a potential grounds for distinction of those cases, and it may well be that those cases discuss in essence joint tenants or joint participants on a claim, where the other one attempts to overclaim or perform work on overclaims, for example.

There may be grounds for distinguishing this case where we're talking about an entirely separate class of claims, the Osuna claims, which the court has already stated, has some precedence. So I'll have to review those claims, but what I

> anticipate is that this may be the principle for fashioning a remedy, and that is, the parties did anticipate working together. The agreement shows that. The agreement shows that they anticipated the merger, until the lawsuit was resolved, Mr. Scharf had no intention of being embroiled in that lawsuit with Mr. Hoover. The agreement acknowledges that.
>
> For that very purpose, it appears that there was a transfer of the mill site claims, but a simple grant of a right to mine the claims that were in litigation with Mr. Hoover. So I conclude, the intention from the testimony and the agreement was that in essence, the parties wanted that litigation to conclude, and then clearly anticipated that they would then joint venture and work together for the mining of these claims.

The March 6, 1989 order changed the date of commencement of the joint venture to December 11, 1986. The court ordered reformation of the January 5, 1982 agreement to reflect the same.

There are two facts discussed in the mining cases recited by the court that are not present in this case. First, Zodiac was not the original locator nor was it the owner of the pumice claims. Second, it would appear that the court imposed the joint venture as an equitable remedy for violation of a trust. However, there must

first be a relationship creating a trust, or fiduciary duty, between the parties before a violation of that trust can be found. Ordinary contract agreements do not create such a trust, so the finding of a joint venture, or similar relationship, is implicit in finding that there was a violation of a trust.

The court briefly discussed the possible application of mining law but at no point clarified the cases or specific principles upon which the court relied. In reaching its decision, this Panel reviewed applicable mining law, a summary of which follows. The parties agreed at oral argument before the Panel that Cal Pumice owned the pumice claims it purchased from Osuna. Zodiac admitted that the only rights it had to the pumice claims, if any, stemmed from the courts [*sic*] finding that based on the May 5, 1982 [*sic*] agreement, the parties intended a merger.

Early mining law developed in the American West through case law relating mostly to the mining of solid minerals. The earliest case law establishing the elements of a mining partnership is *Skillman v. Lachman* , 23 Cal. 198 (1863). The common law of mining partnerships continued to develop in the case law and was codified into statute in California, Idaho, Montana and Nevada with identical codes.

In general, no distinction is made between joint ventures and mining partnerships. Groves, Co-Ownership of Mining Property and Mining Partnerships, 2 *Rocky Mt. Mineral Inst.*, 217, 227 (1956). Except for the fact that joint ventures usually involve only one enterprise, the rights and liabilities are substantially the

same as those of a mining partnership. "In the case of joint venture, the rights and liabilities are exactly those of partners in a general partnership, except of course, that the rights and liabilities apply to only the single venture. I know of no other exception to this broad general rule." Siefin, Joint Ventures and Mining Partnerships, 8 *Kan. B. J.* 20, 23 (1939).

Under California law, "[a] mining partnership exists when two or more persons who own or acquire a mining claim for the purpose of working it and extracting the mineral therefrom actually engage in working the claim." Cal. Pub. Res. Code § 3940. "An express agreement to become partners or to share the profits and losses of mining is not necessary to the formation or existence of a mining partnership. The relation arises from the ownership of shares or interests in a mine and working it for the purpose of extracting the minerals therefrom." Cal. Pub. Res. Code § 3941.

a. Co-Ownership of Mining Property

The first inquiry in deciding whether a mining partnerships [*sic*] exists is whether there is sufficient co-ownership of the mineral interest, here the subject pumice claims, upon which the partnership may be based. Zodiac quitclaimed all of its interest in the pumice claims to Cal Pumice on March 6, 1982 as part of the settlement agreement wherein Scharf cancelled Zodiac's defaulted promissory note. The deeds were recorded on March 9, 1982. The ruling of the *Osuna* court was that Zodiac was not the owner of the pumice claims. The parties agreed at oral argument that Zodiac did not have, nor had it ever, an ownership interest in

the pumice claims. Even if Zodiac had an interest in the pumice claims only by virtue of the intent to enter into a joint venture upon the occurrence of contingent events, there is no *in praesenti* ownership interest. *See Shell Petroleum Corp. v. Caudle*, 63 F.2d 296 (5th Cir. 1933); *Southard v. Oil Equip. Corp.*, 296 P.2d 780 (Okla. 1956).

b. Joint Operation of Mining Property

Joint ownership and joint operation are factors that are usually considered in tandem in deciding whether a mining partnership exists. Fiske, Mining Partnership, *Institute on Oil and Gas Law* 187, 195 (1975). Joint operation of a mining property is usually defined as cooperation in the working of the mine, in which each of the partners has some part in carrying on mining operations. *Treat v. Murdock*, 8 Cal. 2d 316, 65 P.2d 881 (1937); *Peterson v. Beggs*, 26 Cal. App. 760, 148 P. 541 (1915). Joint operation of the mining claim does not require that each of the partners actually perform physical work upon the claim; where one of the parties supplies money used in working the claim, he is engaged in the joint operation. *Harper v. Sloan*, 177 Cal. 175, 181-82 (1917). There is no evidence that Zodiac participated in the operation of mining the pumice claims. Zodiac contributed no funds, labor or equipment to the effort. "Each party must have some element of involvement in the actual conduct of those operations which are necessary to make the property productive. It may be exercise of any function in control, direction, or management of a common enterprise." Fiske, *supra*, at 201. This element appears to be lacking because Zodiac failed to show that it was

involved in operation of the pumice claims. The right of joint participation in the management and control of the business is an essential element of a joint venture. *Spier v. Lang*, 4 Cal. 2d 711, 716 (1935). However, it has long been held that an agreement to share in the profits does not require a finding of a joint venture where there is no joint participation in the management and control of the business. *Id.* (citations omitted).

c. Sharing of Profits and Losses

Under California law, there is no need for an express agreement to share the profits or losses because that is implied once the partnership is formed based on the ownership of shares or interests in a mine and working it for the purpose of extracting minerals. As discussed above, we find that there was no mining partnership formed because those elements were not present in the relationship between Zodiac and Cal Pumice. Therefore, we need not discuss the sharing of profits and losses pursuant to Cal. Pub. Res. Code § 2353.[5]

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[5] Cal. Pub. Res. Code § 2353 provides:

> A member of a mining partnership shares in the profits and loses [*sic*] thereof in the proportion which the interest or share he owns in the mine bears to the whole partnership capital or whole number of shares.

The court determined that the joint venture an enterprise in which the division of profits was to be 50% to each party. There was no evidence of the proportion of Zodiac's alleged interest in the mine in proportion to the whole partnership capital, while Cal Pumice

(continued...)

IV.

CONCLUSION

The question of whether a joint venture was created is a question of fact to be determined by the trier of fact from the facts and inferences therefrom. The court made no findings that any of the elements of a joint venture were present. From its finding of the joint venture, the court then applied the remedies of reformation of the Agreement of Compromise and Settlement, and judicial dissolution of the joint venture. The court did not properly conclude that there was a joint venture, and therefore, we REVERSE the finding of the court that Zodiac and Cal Pumice entered into a joint venture.

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[5](...continued)
introduced evidence of well over 2 million dollars of losses in expenditures from January 5, 1982 through October 31, 1988.

PERRIS, Bankruptcy Judge, concurring:

Although I agree with the result and most of the reasoning of the majority's disposition, I write separately to address more fully Zodiac's contention regarding our inability to review the issue of the existence of a joint venture. Zodiac argues that the fact that the appellants did not appeal the August 17, 1988 judgment, in which the bankruptcy court found the existence of the joint venture, renders that judgment final and conclusive as to that issue and precludes our review of the bankruptcy court's finding of the existence of a joint venture.

Zodiac's arguments are not persuasive because the August 17, 1988 judgment was not final for purposes of appeal. Courts have uniformly held that a judgment determining that a party is entitled to an accounting and referring the matter to a subordinate tribunal to conduct the accounting is not a final judgment. *See Latta v. Kilbourn*, 150 U.S. 524, 539-40 (1893); *Twin City Pipe Trader Service Assoc. v. Fred Plaas Plumbing & Heating Co.*, 815 F.2d 58, 60 (8th Cir. 1987); *In re County Management, Inc.*, 788 F.2d 311 (5th Cir. 1986); *In re Goldblatt Bros., Inc.*, 758 F.2d 1248 (7th Cir. 1985). Such holdings are consistent with the Ninth Circuit's "pragmatic" approach to finality in bankruptcy under which an order will not be considered final if further proceedings will affect its scope. *See In re Technical Knockout Graphics, Inc.*, 833 F.2d 797, 800 (9th Cir. 1987).

The August 17, 1988 judgment determined the existence of a joint venture and Zodiac's entitlement to an accounting and a share of profits of the joint venture,

but it did not finally determine the issue between the parties. Rather, the judgment ordered the appellants to provide an accounting to Zodiac and to the court and indicated that the court would rule upon the respective credits and obligations after it received the accounting. The judgment clearly contemplated further proceedings that would affect the scope of the relief afforded the parties in the adversary proceeding and, under the authority discussed above, it was not final. As the August 17, 1988 judgment was not final for purposes of appeal, the issues determined by that judgment are properly before this panel in this appeal. *See U.S. Dominator, Inc. v. Factory Ship Resoff*, 768 F.2d 1099 (9th Cir. 1985) (in reviewing a final judgment, an appellate court has jurisdiction to review interlocutory rulings affecting the final outcome).

Having determined that the issue is properly before us, I agree with the majority's reversal of the joint venture finding. The appellee conceded at oral argument that the only evidence supporting the existence of the joint venture is the agreements of November 24, 1981, and January 25, 1982 [*sic*]. As the majority explains, this evidence is not sufficient to support a finding of a joint venture or mining partnership. To the extent that the bankruptcy court imposed the joint venture upon the parties as a equitable remedy, the parties do not cite, nor did my research uncover, authority for imposing such a remedy under the circumstances existing in this case.

No. 94-1615

Supreme Court, U.S.
FILED
APR 28 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

In re
ZODIAC INVESTMENT, INC.,

Debtor.

[redacted]NIA POZZOLAN, INC. and EDWARD SCHARF,

Petitioners,

vs.

ZODIAC INVESTMENT, INC.,
PATRICK C. CLARY and RONALD A. KASTANEK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ZODIAC INVESTMENT, INC.

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QUESTION PRESENTED

The question presented for review is whether the Ninth Circuit Court of Appeals committed error in its determination of what constituted the law of the case determined by the Bankruptcy Appellate Panel of the Ninth Circuit in a previous appeal, and in rendering a decision which is in conflict with its decision in a previous appeal from the Bankruptcy Appellate Panel in the same case.

PARTIES TO THE PROCEEDINGS

Zodiac Investment, Inc., Glen C. Nelson, Trustee for Zodiac Investment, Inc., Debtor, Patrick C. Clary, Ronald A. Kastanek, California Pozzolan, Inc., and Edward Scharf.

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No. 94-1615

In The

Supreme Court of the United States

October Term, 1994

In re
ZODIAC INVESTMENT, INC.,

Debtor.

CALIFORNIA POZZOLAN, INC. and EDWARD SCHARF,

Petitioners,

vs.

ZODIAC INVESTMENT, INC., PATRICK C. CLARY and RONALD A. KASTANEK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT ZODIAC INVESTMENT, INC.

Respondent, Zodiac Investment, Inc., opposes the Petition of California Pozzolan, Inc. (now Cal Pumice Inc.) and Edward

Scharf for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals filed December 23, 1994 on the grounds that there is *no conflict* between this decision and prior appellate decisions of the Ninth Circuit Court of Appeals and the Bankruptcy Appellate Panel.

OPINIONS BELOW

The Order of the Ninth Circuit Court of Appeals, filed January 20, 1995, denying the petition for rehearing is Appendix A to Petitioners' Brief.

The Memorandum Opinion of the Ninth Circuit Court of Appeals filed December 23, 1994, is Appendix B to Petitioners' Brief.

The Judgment and the Memorandum Opinion of the Bankruptcy Appellate Panel of the Ninth Circuit filed November 22, 1993, is Appendix C to Petitioners' Brief.

The Judgment and the Memorandum Opinion of the Ninth Circuit Court of Appeals filed March 31, 1992, is Appendix D to Petitioners' Brief.

The Judgment and the Memorandum Opinion of the Bankruptcy Appellate Panel of the Ninth Circuit filed October 11, 1990, is Appendix E to Petitioner's Brief.

STATEMENT OF JURISDICTION

1. The judgment to be reviewed is December 23, 1994.

2. The date of the order denying Respondents' motion for rehearing is January 20, 1995.

3. This Court has jurisdiction to review the judgment of the Ninth Circuit Court of Appeals as set forth in 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Cal Pumice Inc. and its sole owners, Edward Scharf (hereafter "Scharf") entered into a scheme with the prior owners of Zodiac Investment, Inc., (hereafter "Zodiac") to defraud Zodiac's creditors by conveying certain mining claims, known as the "Margie mining claims" to Scharf to prevent Zodiac's creditor, David E. Hoover (hereafter "Hoover") from whom Zodiac obtained the claims, from obtaining a return of the claims through the bankruptcy proceedings. (Petitioners' Appendix D, p. 3, ¶3).

While holding these Margie mining claims in trust, as a constructive trustee, Scharf together with Zodiac and Hoover were sued by Bonnie Osuna (hereafter "Osuna") who claimed to own mining claims conflicting with the Margie claim, referred to in the lawsuit as the "Osuna mining claims".

Both Zodiac and Hoover were in bankruptcy proceedings at the time and could not be sued by Osuna without obtaining relief from stay. Scharf and Osuna agreed to dismiss Hoover and Zodiac from the lawsuit (without informing them of the dismissal) and to proceed with the lawsuit between themselves and to allow a judgment to be entered in favor of Osuna. Once judgment was entered, Scharf purchased the Osuna mining claims from Osuna in order to assert them against Zodiac's and Hoover's ownership of the Margie claims in violation of his constructive trustee capacity.

Zodiac, who had filed for bankruptcy protection in 1982 in the State of Nevada bankruptcy courts, sued for return of the

claims and damages. During the pendency of the litigation, Scharf caused his corporation, Cal Pumice, Inc. to transfer the claims to himself in order to put them beyond the reach of the bankruptcy court and also failed to provide a proper accounting for which the trial court ordered sanctions in the form of attorney fees.

The court ultimately ordered Scharf to transfer the Osuna mining claims to Zodiac, ordered Scharf to pay sanctions and damages to Zodiac and created a joint venture between the parties under its equity powers. Scharf appealed to the Bankruptcy Appellate Panel (hereafter "BAP").

A. The 1990 BAP Opinion of October 11, 1990 (Petitioners' Appendix E)

On October 11, 1990, the BAP issued its decision in which it "reversed the *finding* of joint venture" (emphasis added). In its opinion the BAP did not discuss sanctions nor did it discuss restitution of the Osuna mining claims to Scharf in its decision, even though these issues were before the BAP. It *did not* reverse the entire judgment of the trial court, it reversed *only* the "finding of joint venture". (*See* Petitioners' Appendix E, p. 19, last three lines of the paragraph).

Neither the trial court nor the Ninth Circuit Court of Appeals considered this decision to be a reversal of the entire judgment of the trial court.

B. The 1992 Ninth Circuit Opinion of March 31, 1992 (Petitioners' Appendix D)

The decision of the Ninth Circuit Court of Appeals on March 31, 1992 affirmed the BAP and adopted its "reasoning and result" which reasoning and result only dealt with the reversal of the *finding of joint venture.* The Ninth Circuit Court also interpreted

the BAP opinion by stating that the parties "come before us with less than clean hands. The transfer undergirding this case had as its objective the defrauding of Zodiac's creditors" (Petitioners' Appendix D, p. 3 last paragraph) and further stated that "The BAP's Memorandum of *Opinion and Judgment* do not address any of the bankruptcy court's orders requiring the parties to convey title to mining claims" (Petitioners' Appendix D, p. 4, ¶ 2).

Scharf's motion to the trial court for restitution of claims and for accounting was denied on the ground that both the BAP decision of October 11, 1990 and the Ninth Circuit decision of March 31, 1992 constituted only a partial reversal of its prior judgment and that neither judgment reversed the sanctions ordered and the Ninth Circuit has specifically stated that the BAP opinion did not address the issue of restitution of mining claims.

C. The 1993 BAP Opinion of November 22, 1993 (Petitioners' Appendix C)

The BAP reversed the trial court's supplemental orders ordering payment of sanctions and denying restitution of claims stating merely that:

> The decision rendered by this panel on October 10 (Sic) 1990 was meant to be a general reversal of the order of the bankruptcy court. Unfortunately, we did not explicitly state the necessary consequences of reversal of the trial court's fundamental premise that there was no joint venture.

(Petitioners' Appendix C, p, 9, ¶ 3).

The BAP did not address any issues raised on appeal, but merely stated that the prior opinion was incomplete.

D. The Ninth Circuit Court of Appeals Opinion of December 23, 1994 (Petitioners' Appendix B)

The Ninth Circuit Court of Appeals reversed the BAP opinion and judgment of November 22, 1993 and reinstated the supplemental judgments of the trial court stating that: "The BAP misapplied our holding (in the March 31, 1993 decision) in the BAP's most recent decision (BAP November 22, 1993 decision) concluding that reversal of a finding of joint venture necessitates a reversal of the orders awarding sanctions and transfer of mining claims to Zodiac. The BAP's conclusion exceeds the directives of our judgment." (Petitioners' Appendix B, p. 8, ¶ 3).

The Ninth Circuit goes on to state that sanctions stand completely independent of the existing joint venture (*Pan Pacific Low Ball Television, Co. v. Pacific Union*, 897 F.2d 594, 596 (9th Cir. 1993)) and were not timely challenged and that the BAP's October 11, 1990 opinion "failed to address the trial court's orders requiring the parties to convey title to mining claims". (1992 Ninth Circuit Opinion at 2). The BAP is wholly without authority to "correct" what it apparently perceived as our misunderstanding of its prior decision" (Petitioners' Appendix B, p. 9, ¶ 3).

The Ninth Circuit then recognizes that the trial court had been motivated by equitable concerns when it ordered the original transfer of the claims from Scharf to Zodiac and that these same equitable concerns governed the trial court's "persistent refusal to transfer the claims back to Scharf or Cal Pumice". (Petitioners' Appendix B, p. 9, ¶ 3) and further stated "The bankruptcy court's orders were fully supported by the facts and the law" (Petitioners' Appendix B, p. 10).

REASONS FOR DENYING THE WRIT

Petitioners' fail to recognize the fact that an appellate decision is determinative of only those issues addressed in the opinion (*De Pinto v. Landoe*, 411 F.2d 297 (9th Cir. 1969); *New York Life Insurance Company v. Gomer*, 106 F.2d 375 (9th Cir. 1939).

In the appeal that resulted in the October 11, 1990 BAP opinion, numerous issues were raised in the appeal, including sanctions, restitution of claims and damages. The BAP ignored all issues except the issue of joint venture and then reversed the "finding of joint venture" only. The BAP therefore chose to make no ruling as to restitution of claims or sanctions and the decision rendered did not state that the trial court's judgment was reversed, only that the "finding" of joint venture was reversed.

The Ninth Circuit, in its December 12, 1994 decision, specifically points out the fallacy of Petitioners' reasoning that the 1990 and 1992 decisions constituted a reversal of "the entire judgment" and states: "Here, the 1990 BAP reversal and our affirmance of it adjudicated, and is therefore conclusive, *only on the issue of joint venture*" (emphasis added) (Petitioners' Appendix B, p. 7, ¶ 2).

Petitioners' misconstrue the decisions as conflicting opinions when in fact no conflict exists, except in the mind of Petitioners', who repeatedly assert that the BAP's 1990 ruling was a reversal of the "entire judgment". Petitioners' are incorrect in this assertion. What the BAP intended in its 1990 decision and what it actually did are two different things. I has no jurisdiction to correct a perceived error by rendering a second opinion after the Ninth Circuit has reviewed the case.

Based upon the explanation of the Ninth Circuit in its

December 23, 1994 decision, neither it, not the trial court understood the 1990 BAP decision to be a reversal of the "entire judgment" of the trial court and based thereon it rendered its 1992 decision and the 1994 decision, which are the only opinions of importance in this case.

Based on the above, it is obvious that this case is not appropriate for review under Rule 17.1(a) or any other rule.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Dated: April 24, 1995

Respectfully submitted,

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